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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BERNARD DASKAL

Appeal 2011-003946
Application 09/489,655
Technology Center 3700

Before: JENNIFER D. BAHR, LINDA E. HORNER, and
ANTON W. FETTING, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Bernard Daskal (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's rejections of claims 1 and 5-7 under 35 U.S.C. § 103(a) as being unpatentable over Van Iten (US 5,188,625, iss. Feb. 23, 1993) and, alternatively, as being unpatentable over Datta (US 4,801,494, iss. Jan. 31, 1989). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

The Invention

The claims are directed to a feminine hygiene pad comprising a topsheet having a dark color, such as black, brown, or red. Claim 1, reproduced below, is illustrative of the claimed subject matter:¹

1. A feminine hygiene pad that is worn in the crotch portion of an undergarment, said feminine hygiene pad comprising:
 - a central body fluid absorbent core having a body facing side and an undergarment facing side;
 - a fluid permeable topsheet overlaid on said body facing side of said central body fluid absorbent core and having a dark color; and
 - a fluid impermeable backsheet overlaid on said undergarment facing side of said central body fluid absorbent core and placed in register with said fluid permeable topsheet.

¹ Claims 5-7 differ from claim 1 in that they specifically call for the topsheet to be "black," "brown," and "red," respectively, rather than having a dark color.

OPINION

The rejection based on Van Iten

The Examiner found that Van Iten describes a sanitary napkin satisfying all of the limitations of claims 1 and 5-7, with the exception of the color of the topsheet (cover 184). *See* Ans. 3. In particular, the Examiner correctly found that Van Iten’s sanitary napkin comprises a cover 184 that may be selectively colored, in order to mask stains caused by menstrual fluids, with preferred colors including blue or green. *See id.*; Van Iten, col. 11, ll. 6-23. Appellant does not dispute these findings.

The Examiner reasoned that because the cover colors disclosed by Van Iten perform the same purpose as the dark colors of the claimed invention, it would have been obvious to one of ordinary skill in the art to make Van Iten’s cover in any of the colors called for in Appellant’s claims. Ans. 4. According to the Examiner, the person of ordinary skill in the art “would have readily recognized that many different colors could be selected and utilized to satisfy the desired result of visual masking of stains during the use of the sanitary product.” *Id.*

The Examiner’s reasoning has rational underpinning. Van Iten’s disclosure of adding colorants to the cover for the purpose of visually masking or attenuating “the typical red menstrual stain observable during use” (col. 11, ll. 6-13) would have prompted a person of ordinary skill in the art to use any color capable of masking typical red menstrual stains for the cover, including a dark color (as called for in claim 1), such as black, brown, or red (as called for in claims 5-7, respectively).

Appellant argues that Van Iten’s teaching of blue, blue-green, or green colors for the cover would not have suggested the use of dark colors, such as those called for in Appellant’s claims. App. Br. 10. This argument does not

point to error in the rejection, because the Supreme Court has stated that a rigid insistence on teaching, suggestion, or motivation is incompatible with its precedent concerning obviousness. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 419 (2007). Rejections on obviousness grounds must be supported by “some articulated reasoning with some rational underpinning” to combine the known elements in the manner required in the claim at issue. *Id.* at 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). However, “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418. Further, while Van Iten describes colors in the blue, blue-green, and green areas of the visual light spectrum as being preferred colors for performing the masking, Van Iten also broadly teaches using colors that would attenuate the typical red menstrual stains observable during use of the sanitary napkin. These broader teachings of Van Iten must be considered as well. A reference is not limited to its preferred embodiment, but must be evaluated for all of its teachings, including its teachings of non-preferred embodiments. *In re Burckel*, 592 F.2d 1175, 1179 (CCPA 1979).

Appellant argues that “dark colors have been shown in practice to be ineffective in masking, for example, light, non-menstrual stains such as leukorrhea.” App. Br. 10; Reply Br. 5; *see also* Daskal Decl., para. 5. Even assuming this argument to be correct, this in no way suggests that dark colors would not be suitable for the purpose prescribed by Van Iten, namely, visually masking or attenuating “typical red menstrual stain[s].”

Appellant additionally argues that Van Iten teaches away from the claimed invention because the colors (blue, blue-green, and green)

specifically mentioned by Van Iten “are not ‘colored’ surfaces for the purposes of the Rabbinic Decree,” and thus would be unacceptable for the purposes disclosed in Appellant’s Specification. App. Br. 11. While this line of reasoning presents an appealing argument as to why it might not have been obvious to use the preferred colors of Van Iten for the purpose disclosed in Appellant’s Specification, it is not particularly relevant to the modification proposed by the Examiner, namely, making Van Iten’s cover a dark color, such as red, black, or brown, to achieve Van Iten’s stated purpose of masking typical red menstrual stains. While Van Iten discloses preferred colors in the blue, blue-green, and green areas of the color spectrum, Van Iten in no way disparages or discourages the use of other colors that would mask typical red menstrual stains, and thus does not teach away from the claimed invention.²

Appellant’s argument on page 11 of the Appeal Brief that the Examiner failed to address claims 5-7 is not accurate. The Examiner does not, as Appellant contends, address only “dark” colors. The Examiner’s rejection specifically points out that Van Iten’s preferred colors “effectively perform the same purpose as *the dark colors of the claimed invention.*” Ans. 4 (emphasis ours). Further, the rejection proposes making Van Iten’s color “in the *colors of the instant claims.*” *Id.* (emphasis ours). Inasmuch as Appellant’s claims recite black, brown, and red, the Examiner’s reference to “dark colors of the claimed invention” and “colors of the instant claims” covers these colors.

² Prior art does not teach away from claimed subject matter merely by disclosing a different solution to a similar problem unless the prior art also criticizes, discredits or otherwise discourages the solution claimed. *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

Appellant argues that the Neiman Declaration “makes clear that the present invention provides a long-felt need to the Jewish community.”

Reply Br. 6; *see* Neiman Decl., para. 9.

Establishing long-felt need requires objective evidence that an art-recognized problem existed in the art for a long period of time without solution. In particular, the evidence must show that the need was a persistent one that was recognized by those of ordinary skill in the art. *In re Gershon*, 372 F.2d 535, 539 (CCPA 1967). An argument based upon long-felt need must be accompanied by evidence that demonstrates the existence of a problem which was of concern in the industry and has remained unsolved over a long period of time. *See Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567 (Fed. Cir. 1984). This can be accomplished, for example, by the testimony of experts in the industry, or publications and the like, which speak to the duration and extent of the problem, and of the substantial effort and resources which had been expended during that time in attempts to solve the problem. *See Railroad Dynamics, Inc. v. Stuki Co.*, 579 F. Supp. 353, 363 (E.D. Pa. 1983), *aff'd* 727 F.2d 1506 (Fed. Cir. 1984), *cert. denied* 105 U.S. 220 (1984). Once the long-felt need has been established, it must further be shown that the invention satisfied that need. *See In re Cavanagh*, 436 F.2d 491, 496 (CCPA 1971). This can be demonstrated, for example, by evidence establishing commercial success and that the industry purchased the claimed invention because it satisfied the long-felt need. *See W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1555 (Fed. Cir. 1983).

The Neiman Declaration states that there has been a long-felt need in the Jewish community for a feminine hygiene pad which would preclude the circumstance of non-menstrual stains raising the question of whether a

woman is a *Niddah*. Neiman Decl., para. 9. The Neiman Declaration does not provide any evidence of any efforts or resources expended by others to solve this problem, and Appellant does not point to any such evidence, to show that the problem was a persistent one that was recognized by those of ordinary skill in the art and went unsolved for a long period of time.

After reviewing all of the evidence before us, including the Neiman and Daskal Declarations, we conclude that the evidence of obviousness outweighs the evidence of nonobviousness. Accordingly, the Examiner did not err in rejecting claims 1 and 5-7 as being unpatentable over Van Iten. We sustain the rejection.

The rejection based on Datta

We need not address this rejection, because our decision affirming the rejection based on Van Iten is dispositive as to all claims on appeal.

DECISION

For the above reasons, the Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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